SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1496~~ 207

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

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IN THE

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OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada, now named Transcontinental Power Company, a corporation, often referred to as Transcon, pray that a Writ of Certiorari issue to review judgments of the Supreme Court of Nevada in the matter before it entitled Jones vs. Free, its No. 5107 and the district court orders affirmed thereby.

Opinions Below.

The opinion of the Supreme Court of Nevada is reported at 422 P. 2d 551. That opinion will be, and the opinion denying rehearing may be, reported in 83 Nev. They are respectively Appendices E and G hereto. The District Court opinion (Appendix C) will not be reported.

Jurisdiction.

On January 9, 1967 the Supreme Court of Nevada rendered its decision, filed its opinion and entered judgment in subject matter. On January 24, 1967 petitioners filed timely a Petition for Rehearing. On February 13, 1967 said court filed its order denying said petition and entered judgment accordingly. On May 4, 1967 the Honorable William O. Douglas, Justice, ordered that the time for filing a Petition for Writ of Certiorari be extended to and including June 1, 1967.

The statutory provisions believed to confer jurisdiction on the Supreme Court to review on Certiorari are: 28 U.S.C. §1257 (3) and §2106. The application is timely: 28 U.S.C. §2101 (c).

Questions Presented.

A negative answer to any of the following jurisdictional questions should result in certiorari and reversal:

1. Can a state court constitutionally remake the contract between the parties?

2. Can a temporary receiver of one party appointed on the application of another party to a lawsuit constitutionally remake the contract between the parties to such suit?

3. Prior to a judgment on the merits, can a court constitutionally delegate to a receiver the

authority to settle the very litigation in which he was appointed and deny to a litigant a trial on the merits?

4. Can a receiver appointed in an action in one state convey or alter title to land in another state without an appointment or court order in the state where the land is situated?

Other questions are:

5. Have petitioners been deprived of due process in the Nevada proceeding by any of the following procedural discrepancies:

A. Exclusion of one of petitioners as an appellant by virtue of the omission of its name from an Amended Notice of Appeal although it was included in the original Notice of Appeal?

B. Refusal to file part of the record prepared late because an officer of the court held all of a corporate party's assets and did not make funds available?

C. Denial of effective aid of counsel where parties and the court have notice of temporary incapacity of counsel for a party due to illness and hospitalization at a time when such party was subject to a receivership?

The Constitutional Provisions Involved.

The pertinent provisions of The United States Constitution are the portion of §1, Amendment XIV as follows:

". . . nor shall any State deprive any person of life, liberty or property without due process of law;"

and the full faith and credit clause of §1, Article IV.

Statement of the Case.

A. Orders of the Trial Court.

The orders of the trial court which were affirmed by the Supreme Court of Nevada by its judgments hereby sought to be reviewed on certiorari are as follows:

1. "ORDER APPROVING SETTLEMENT AGREEMENT AND ASSIGNMENT OF LEASE" filed February 26, 1965 by which the trial court authorized the receiver to settle the case [Rec. Vol. II, pp. 387-388; Appendix A hereto].

2. An Order filed May 4, 1965 granting without notice to petitioners a motion of the receiver to dismiss the counterclaims (pursuant to the settlement authorized by the order filed February 26, 1965 [Rec. Vol. III, p. 421; Appendix B hereto].)

3. An Order filed February 23, 1966 denying the motion to set aside the foregoing orders [Rec. Vol. III, p. 577; Appendix D hereto].

B. The Facts.

On October 1, 1959 Transcon acquired a steam and mineral lease from Salton Sea Power Co. [Rec. Vol. III, pp. 570-574]; said lease described ~~said~~ seven square miles. Transcon generated electricity from natural steam produced from beneath the surface of said land through a well drilled and cased somewhat is the manner of exploration for and production of oil and hydrocarbon gas (although not in the record, the said seven square miles includes over 25% of the estimated reserves of natural steam in the Imperial Valley. The Imperial Valley field is the second in the United States from which electricity has been sold commercially).

On June 19, 1962, said Transcon and respondent Western Geothermal, Inc., entered into an agreement reciting that the parties intended to enter into a joint venture whereby each would take part in exploration and development of geothermal steam; that Western would, upon execution of the agreement, pay $2,500.00 to Transcon to be applied by Transcon towards payment of current tax and trade obligations; that within 120 days Western would commence drilling or deepening the existing well on said lease (referring to the second well drilled on the property); that drilling by Western would be continued in accordance with good drilling practice until completion or abandonment, and in the latter event, that Western would commence drilling another well within 15 days; that within 6 months of completion it would commence, and within one year, complete wells ". . . . capable of producing geothermal energy sufficient to support a power contract under which a minimum of 12,500 kw of electricity could be continuously supplied on a commercial basis", and provided that Western would have 49% of net profits of any well it drilled and in the event that it drilled wells to support such a power contract, then Western would be entitled to 60% of net profits. Said agreement provided that Transcon could acquire an interest in nearby leases Western may acquire and prohibited assignment without consent of the parties thereto [Rec. Vol. I, pp. 107-112]. Western drilled one well prior to the filing of suit.

On August 9, 1963, plaintiff William Free filed his complaint in the matter sought to be reviewed hereby [Rec. Vol. I, pp. 1-4; Amended Complaint Vol. I, pp. 42-48] in the Second Judicial District Court, State of Nevada, in and for the County of Washoe, alleging that he was a stockholder of Transcon and

that other petitioners herein were directors and officers of Transcon and were wasting its only asset, to wit: said steam and minerals. (Transcon's only asset was said lease and claims to other leases per the June 19, 1962 agreement). Plaintiff petitioned for the appointment of a receiver of the "corporation assets" supported by affidavits of an officer and an attorney for Western [Rec. Vol. I, pp. 9-14].

A few days prior to the filing of the action, Western or its parent corporation advanced $50,000.00 to plaintiff on stock allegedly of Transcon (Ide's Depo. pp. 48-49, 52, Rec. one of two Volumes marked Vol. XI). Western moved for leave to intervene and join in "Plaintiff's prayer for the appointment of a temporary Receiver for Defendant, Transcontinental Power Company". [Rec. Vol. I, p. 22] and filed its Complaint in Intervention [Rec. Vol. I, pp. 36-38] seeking the appointment of a receiver and alleging that it held an interest in said lease by reason of said agreement dated June 19, 1962. Harry C. Levy was appointed as temporary receiver of the affairs and assets of Transcon on such petitions [Rec. Vol. I, pp. 49-50] and by order filed December 13, 1963 Salton Sea Power Company was added as a party to the within proceedings [Rec. Vol. I, p. 123]. Said Harry C. Levy, the receiver of Transcon, was appointed in an order naming him as Harry Levy, as the receiver of Salton Sea Power Company [Rec. Vol. II, p. 232, lines 3-6].

In December, 1964 the trial in the within matter was commenced but its conclusion adjourned from time to time [Rec. Vol III, pp. 426 and 457]. No findings of fact or judgment were made or given on the merits of the controversies.

On the receiver's petition [Rec. Vol. II, pp. 353 *et seq.*], filed after the hospitalization of counsel for peti-

tioners herein and heard by the court after notice to the court and all concerned of his automobile accident, operation and physical condition [motion to continue the trial, Rec. Vol II, pp. 384-385 and affidavit attached thereto of J. H. Bauer, M.D.], the court authorized the proposed settlement between the receiver and Western. By it the lease was assigned by the receiver to Western, drilling requirements contained in the June 19, 1962 agreement were waived and Transcon's interest under that agreement (40% upon performance by Western and more upon lack of performance) was reduced to 20% of profit on operation by Western and 20% of reservation on a farmout; Western agreed to pay $50,000.00 and to quitclaim or pay $150,000.00 [Rec. Vol. II, pp. 396-414]. Since all investment and costs are to be repaid (not amortized) a 20% carried interest is only ½ of a 40% working interest (plus interest).

Thereafter, pursuant to said agreement, on the receiver's *ex parte* motion, the counterclaims of petitioners therein were dismissed (App. B).

Of the $50,000.00, the receiver and his attorney were allowed $13,950.00 as fees [Rec. Vol. II, pp. 324-325, Vol. III pp. 527-532].

After obtaining the receiver's agreement dated March 19, 1965 pursuant to the court order of February 26, 1965 eliminating the drilling requirements contained in the joint venture agreement and obtaining releases of clouds on the title to the lease, Western and the lessor promptly made and entered into an agreement whereby the covenants of the lease requiring further drilling were waived [Rec. Vol. III, pp. 496-508].

Because of non-payment of costs (a problem caused by the existence of the receiver of Transcon), Trans-

con's then counsel was relieved on his motion [Rec. Vol. III, pp. 424-430]. There was some evidence that before he learned of the Amendment to the lease, he thought that the settlement was the best that could be done but he said he would have to resist [Rec. Vol. III, p. 469] and there was not an iota of evidence, that he had authority to or purported to settle. Petitioner Jackson first learned of the negotiations and settlement in late April 1965 [Rec. Vol. III, p. 473].

In August, 1965, Springer & Newton of Reno, Nevada and Roy B. Woolsey of Newport Beach, California became counsel for petitioners herein and promptly moved the court to vacate the orders above-mentioned [Rec. Vol. III, pp. 460-461], and thereafter filed various supporting documents [Rec. Vol. III, pp. 462-474; 483-511; 539-576].

In support of the motion to vacate, petitioners contended that the February 26, 1965 and May 4, 1965 orders were beyond the jurisdiction of the court and deprived petitioners of due process of law and those orders and the receiver's settlement agreement were procured by fraud and mistake.

The fraud and mistake consisted of the representation that the lease would be lost for failure to drill (Western's obligation) if the receiver did not settle the controversies and the fact that immediately upon such settlement and elimination of the covenant in the June 19, 1962 agreement requiring Western to drill, Western entered into said amended lease with the lessor referred to above whereby the covenant of the lease requiring drilling was eliminated. Western represented to the receiver's attorney that the lease would be lost (Rec. Vol. III, p. 494, lines 16-32; also the attorney for the receiver testified that a notice of default had been served, see the one of two volumes marked XI containing the Reporter's Transcript of December, 1965

oral proceedings, p. 125, lines 7-12 [the Nevada Supreme Court said Vol. XI was not a part of the record although petitioners herein moved that court for the late filing of it upon grounds that they lacked funds with which to pay for the same because of the receivership]). The receiver so believed (said one of two volumes marked XI, pp. 106-108). The court so believed [Rec. Vol. III, p. 579]. In any event, the receiver did not demand that intervenor drill and did not make any effort to obtain another operator. As a matter of fact he could not have done so because he held the interest of Transcon only and not the interest held by Western pursuant to the venture agreement in and to the Nelson lease. The receiver admitted that had he known the lessor would waive the drilling requirement, the receiver would have acted differently (said one of two volumes marked Vol. XI, pp. 109-110). Western contended in its brief that there was "no doubt, . . . that absent such agreement, Transcon and Salton Sea would lose all rights in the . . . lease" (Resp. Br. Nev. S. Ct. p. 5, lines 18-28).

C. Petitioners Are Proper Parties on Certiorari.

At all times since the filing of the suit in the District Court, appellant Owen E. Jackson was and now is a stockholder, director and president of Transcon. The other individual petitioners are stockholders and directors. The Supreme Court of Nevada held that the foregoing persons were proper parties appellant to urge on behalf of Transcon the position claimed on its behalf therein (Appendix E).

Transcon was the corporate party whose assets were directly effected and as such is a proper party. Remedies on its behalf were exhausted on the appeal to the Supreme Court of Nevada whether Transcon be considered an actual appellant or not. Transcon was named

as an appellant in a Notice of Appeal served on all parties and mailed to the District Court Clerk by Roy B. Woolsey, California counsel admitted for purposes of the within matter in the proceeding in Nevada [Motion and Petition Rehearing Rec. Vol. XII, pp. 7, 8, 110 *et seq.*]; he requested Nevada counsel to file the required bond. Within the time permitted for taking appeals, the bond, filing fee and an "Amended Notice of Appeal" were filed (Rec. Vol. III, p. 588); through some unexplained inadvertence the name of Transcon was omitted therefrom. The motion to have the original Notice of Appeal deemed filed or the Amended Notice of Appeal be amended to include the name Transcon was not ruled on by the Supreme Court of Nevada although, as pointed out in the Order Denying the Petition for Rehearing, that court had struck a stipulation of the parties with respect thereto [Rec. Vol. XII, pp. 125 *et seq.*]

D. The Federal Questions Sought to Be Reviewed Were Raised Timely and Properly.

The violation of due process was argued in the points and authorities filed in the trial court on October 19, 1965 in support of the motion to set aside or modify the prior orders [Rec. Vol. III, p. 488], in oral argument on that motion [Vol. XI Rep. Tr.] and in the additional written argument filed February 7, 1966 where it was said:

> "We think for a receiver in an action to assign the interest of one of the parties or compromise it by an agreement with the other party who has an interest in the same property prior to a full trial and determination of the rights of the parties violates Amendment XIV to the United States Constitution, wherein the same provides: ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ." [Rec. Vol. III, pp. 543, 544].

It was pointed out to the trial court that the orders decided title to and yet did not bind the parties as to title to California real property [Rec. Vol. III, pp. 491-492].

In petitioners' "Appellants' Opening Brief" in the Nevada Supreme Court filed September 7, 1966 [Rec. Vol. XII, pp. 40 *et seq.*], it was contended that the temporary receiver of the assets of a party to the litigation cannot make and enter into a settlement agreement with the other party to the litigation (in which a receiver was appointed) settling and disposing of the litigation without a trial on the merits [Op. Br. p. 12; Rec. Vol. XII, pp. 40 *et seq.*]; that "The authorization for the receiver to settle the litigation, the dismissal of counterclaims on the receiver's motion, and refusal to accept proofs and try the cause constituted an erroneous delegation of judicial powers beyond the jurisdiction of the court" [Op. Br. p. 13; Vol. XII, pp. 40 *et seq.*]; that making a new contract between the parties was beyond the jurisdiction of the court citing many cases [Op. Br. p. 16; Rec. Vol. XII] and *Siemon v. Russell,* 194 Cal. App. 2d 592, 15 Cal. Rptr. 218 (p. 9 Appellants' Reply Brief); that "The orders, settlement agreement and the court's refusal to receive proofs and try the cause constituted a deprivation of property without due process of law" [Op. Br. p. 17; Rec. Vol. XII, pp. 40 *et seq.*] and the due process of law clause of the XIV Amendment of the United States Constitution was quoted (p. 18); we stated that in *Hosford v. Henry,* 107 Cal. App. 2d 765, 238 P. 2d 91, the court pointed out that a court normally cannot delegate to a receiver the judicial functions of determining the litigation on the rights betwen the parties. It was stated that the Nevada court did not have jurisdiction to determine title to real property in California [Op. Br. pp. 21-22; Rec. Vol. XII, pp. 40 *et seq.*] citing *Universal Oil Land Co. v.*

[Rec. Vol XI

Gates, 117 Cal. App. 363, 2 P. 2d 1034 and *Melvin v. Carl,* 118 Cal. App. 249, 4 P. 2d 954).

The opinion below states that due process was an issue (Appendix E) and it was urged in Point 4 in the Petition for Rehearing that the receiver's holding the assets and other facts deprived petitioners of due process [Rec. Vol. XII, pp. 110 *et seq.*].

Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

A receiver *pendente lite* is a drastic remedy and obviously impairs the ability of the corporation whose assets are taken by the receiver to defend itself. Where a receiver is appointed upon the application of a party to a dispute as to a venture agreement, the corporation whose assets are taken by the receiver is put at an undue disadvantage in connection with the preservation of its rights with that other party.

In criminal proceedings we recognize without question not only the right of the accused to counsel, but the duty of society to provide counsel for him. Where a court has appointed a receiver to take over the assets of a person or corporation, a special duty arises in connection with the preservation of the rights of that party. This is not a case involving merely mismanagement of the affairs of a corporation in its relationships with persons not parties to the lawsuit where the receiver is at liberty to deal with those persons.

The receiver took charge of the assets of Transcon, including its interest pursuant to the venture agreement in and to the Nelson mineral and steam lease. The receiver did not purport to have, and the Nevada Supreme Court pointed out that he did not purport to hold, the interest of Western in and to that lease. He was not in a position to deal for the preservation of

Transcon's interest except with the co-venturer Western. With this handicap there was no pretext that he endeavored to bring in a third person to save the lease, he simply negotiated a different arrangement—a new contract with Western.

If a lease is about to be lost for failure to drill and a dispute of the two parties who own the lease prevents either from going forward, a receiver appointed on the application of either should have the interest of both parties. He can then sell the lease reserving a royalty. Both parties then would have an opportunity to bid and to induce others to bid in hopes of obtaining the lease and operating it. The reserved royalty or other interest and cash would be available for the parties, subject to their rights as determined upon adjudication by the court. However, if the receiver has the interest of one party only, bids by that party and independent parties are not available (unless some party wants a fractional interest in the lease with the other party holding an interest). A bid can not be expected on the interest of one party only particularly if its nature and extent is subject to unadjudicated claims in the law suit. With the uncertainty as to the interest of party whose claim is in receivership the other party is given an unfair advantage for only by an agreement with him (or an order subjecting his interest to the receivership) can anything be done with the lease.

Under the judgments and decisions complained of herein, in any dispute between cotenants, joint venturers, or partners where one party's interest is subjected to a receivership (for alleged mismanagement, insolvency or other reason) and the preservation of the subject of the litigation requires labor or capital or appears in jeopardy for other reasons, the receiver can sell the interest he holds to the other party at less than its value. Often the operator of oil or mining property forms a

joint venture because he cannot finance the operations unassisted. Capital may drive a harsh bargain in coming into such a venture. Under the decisions complained of, the weak financial condition which made the opportunity possible for new capital justifies the appointment of a receiver and remaking the agreement even more favorably to the new capital. Courts should prevent anyone from making a deal to be financed largely on the strength of the project and then freezing others out.

The door should not be open to the abuse committed in this case, that is, the settlement upon the representation that the lease would be lost for failure to drill if the action not be settled and then immediately upon the consummation of the agreement making an agreement with the lessor that no drilling is required. Such constructive or actual fraud will be prevented by recognizing that a property right cannot be taken without a trial and adjudication upon the merits of litigation justifying forfeiture or a partial forfeiture.

Until June 19, 1962 intervenor had no interest in the steam, minerals or the lease and by the agreement bearing that date it acquired a right to earn a position. If it drilled (at its expense) wells producing enough steam to support a power contract for the continuous production of 12,500 kw of electricity it would have a 60% interest. In 1962, as Western Geothermal knew, Transcon had no funds with which to drill. It had expended large sums in producing steam and experimenting on the leasehold. Respondent Western completed one well by January 10, 1963, and one well in 1964. Neither was tested sufficiently to prove commercial production before the making of the orders complained of. Without a trial as to its performance or breach, the receiver assigned the lease to Western. There was no trial on the issue of whether William Free was a stockholder and no cross-examination of witnesses on that issue.

The above-mentioned facts concerning the economic plight of Transcon and how Western got its foot in the door make the difficulty of prosecuting Transcon's rights apparent. The receiver took the assets of Transcon thereby depriving it of any way to raise funds with which to protect itself and deprived its shareholders of means of raising funds to come to the aid of Transcon. Toy Gregory, counsel for Transcon at the time the first two orders were made, withdrew as counsel upon a motion supported by affidavits that his client had not reimbursed him fully for costs. The receiver made no demand that Western or third parties drill [one of two volumes marked XI, pp. 121-123] and no attempt to take possession of the interest of both parties to the venture so he could deal with third parties. He gave part of Transcon's interest allegedly to save the lease from forfeiture for non-drilling (when drilling was the obligation of Western). He also agreed to dismiss Transcon's counterclaim for damages for breach of the drilling obligations. Western benefited by its own wrong.

The first and second questions presented concerning the foregoing are: Can a state court or a temporary receiver of one party appointed on the application of another party to a lawsuit remake the contract between the parties to such suit? These questions should be answered negatively. A few of the cases stating that courts do not have jurisdiction to make a new contract or rewrite a contract for the parties are: *Douglass v. Douglass* (1874), 21 Wall. 98, 88 U.S. 98, 22 L. Ed. 479, 481 (reversing Supreme Ct., D.C.); *Florida Canada Corporation v. Union Carbide Corporation* (U.S. C.A. 2nd Cir. 1960), 280 F. 2d 193, cert. den. 81 S. Ct. 234, 364 U.S. 902, 5 L. Ed. 2d 194 (p. 196: "The courts do not write contracts for the parties nor . . . read into . . . contract . . . words or provisions it does not contain"); *Frankfort Oil Company v. Snokard*

(U.S.C.A., 10th Cir. 1960), 279 F. 2d 436, 444, cert. den. 81 S. Ct. 283, 364 U.S. 920, 5 L. Ed. 2d 259 (p. 444: courts are ". . . without power to rewrite the contract for the parties . . ."); *National Tea Co. v. Weiss* (U.S.C.A. 7th 1965), 341 F. 2d 331, 334 (court "could not itself write a contract for the parties avering the missing essential elements); and *Siemon v. Russell,* 194 Cal. App. 2d 592, 15 Cal. Rptr. 218, S. Ct. hear. den.

Whether the rule that courts cannot make or remake a contract is secured by the due process clause is an issue of importance. We contend that this rule is secured to the parties by the due process clause of The United States Constitution in part because it is established that refusal to recognize the obligations to a contract between litigants denies them due process of law. It was so held in *Hartford A & J Co. v. Delta Pine Land Co.,* 292 U.S. 143, 149, 54 S. Ct. 634, 78 L. Ed. 1178, 1181, where the court said that a state court could not enlarge the obligation of a party to a contract to accord with every local statutory policy solely on the ground that one of the parties is its own citizen. That case involved a contractural limitation of the time to bring a suit on an insurance policy. A similar contract providing for a limitation of time within which to sue was given protection under the due process clause, XIVth Amendment to The United States Constitution in *Home Ins. Co. v. Dick,* 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, reversing the decision of a state supreme court. To the extent that statutory policy was held in these cases not to justify refusal to enforce such a contractural limitation, they may no longer represent the law. See *Clay v. Sun Ins.,* 363 U.S. 207, 480 S. Ct. 1222, 4 L. Ed. 2d 1170, and the dissent therein by Justice Hugo L. Black concurred in by Chief Justice Earl Warren and Justice William O.

Douglas. However, the principle of *Home Ins. Co. v. Dick* that contractural rights are within the protection of the due process clause seems unassailed (subject to the effect of the police power). Other cases holding contractural rights are protected by the due process clause are: *Lynch v. U. S.*, 292 U.S. 571 at 579-580, 54 S. Ct. 840, 78 L. Ed. 1434, 1441; *Lamb v. Powder River Live Stock Co.* (C.C.A. 8th 1904), 132 Fed. 434, 439, and *Holderness v. Hamilton Fire Insurance Co. of New York* (D.C.S.D. Fla. 1944), 54 F. Supp. 145.

Furthermore, a cause of action is property within the due process clause contained in Amendment XIV to the United States Constitution; *Martinez v. Fox Valley Bus Lines* (D.C. Ill. 1936), 17 F. Supp. 576, and *Terraccoiona v. Magee*, 148 A. 2d 68, 53 N.J. Super. 557.

Question three presented is: prior to a judgment on the merits of a controversy between parties, can the court delegate to a receiver authority to settle the very litigation in which he was appointed and by the settlement deny to the litigants a trial on the merits. The very essence of due process involves notice and an opportunity to be heard. For a receiver to be appointed and settle the litigation denies a hearing on the merits as to performance and non-performance of the parties. In this case a trial as to whether or not Western had sufficiently performed to be entitled to retain its interest in the lease was refused. Transcon's pleadings asserted that Western had not drilled diligently as required by the contract and had no rights in the lease. This issue should have been tried. In *Hosford v. Henry*, 107 Cal. App. 2d 765, 772, 238 P. 2d 91, 96, the court pointed out that a court normally cannot delegate to a receiver the judicial function of determining the litigation on the rights between the parties. Certiorari should be granted to determine this important issue.

The fourth question is can a receiver appointed in an action in one state convey or alter title to land in another state without ancillary appointment or court order in the state where the land is situated?

Custom and practice provides for ancillary receiverships in jurisdictions where the property is located. The Nevada court did not have jurisdiction to determine title or permit a receiver to alter title to real property in California and it was so held in *Universal Oil Land Co. v. Gates,* 117 Cal. App. 363, 3 P. 2d 1034, and *Melvin v. Carl,* 118 Cal. App. 249, 4 P. 2d 954. See also, *Hosford v. Henry* cited above.

We say that this rule is protected under the United States Constitution. The importance of granting a writ in this case is made clear by this Honorable Court's decision in *Durfee v. Duke,* 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. The petitioners on certiorari to the United States Supreme Court had brought a prior action against respondents in Nebraska to quiet title to real property. This Honorable Court said:

> "The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska . . . respondent appeared in the Nebraska court and through counsel fully litigated the issues. . . ." (375 U.S. 107-108, 84 S. Ct. 243.)

This Honorable Court pointed out that the Nebraska decision in favor of petitioners was *res judicata.* It appears from *Durfee v. Duke* (and in the C.C.A. Opinion, 308 F. 2d 209, 210-211), that the Nebraska court had *in personam* jurisdiction and nevertheless its jurisdiction was said to depend on whether or not the land was in that state.

Even if the rule that jurisdiction depends upon the land's being within the state applies to *in rem* rather

than *in personam* proceedings, the act of a receiver is *in rem* and justified by the principles of law applicable to *in rem* proceedings; for that reason, receivers of corporations having assets in states other than the state in which appointed apply for an ancillary appointment in the state where the property is located.

In *Pennoyer v. Neff,* 95 U.S. 714, 720, 24 L. Ed. 565, 568, the court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

In *Huntington v. Attrill,* 146 U.S. 657, 669, 13 S. Ct. 224, 36 L. Ed. 1123, 1128, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

In *Scott v. McNeal,* 154 U.S. 34, 45-46, 14 S. Ct. 1108, 38 L. Ed. 896, 901, it was ably said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice. . . ."

If with jurisdiction over the person, the court cannot quiet title to land outside its jurisdiction, certiorari should be granted so such can be so held unhampered by the out of state decree which was *res judicata* in *Durfee.* If the rule against jurisdiction over out of state land is generally limited to *in rem* proceedings, it should apply to acts of receivers anyway. Whether a court with jurisdiction over the person can authorize a receiver to sell or alter title to out of state property is a question of great public importance.

Opinions and Judgments Appended.

Copies of the Opinion of the District Court, the Opinions of the Supreme Court of Nevada, the three orders of the District Court, and the two judgments of the Supreme Court sought to be reviewed are appended hereto in chronological order.

Conclusion.

Each of the jurisdictional questions presented is a question of importance and substance not heretofore decided by the Supreme Court of the United States and decided herein in a way not in accord with law and decisions to the extent applicable.

For the reasons set forth hereinabove, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

ROY B. WOOLSEY and
GILBERT W. BOYNE,
Attorneys for Petitioners.

APPENDIX A.

Order Approving Settlement Agreement and Assignment of Lease Made on February 26, 1965, in the District Court.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

William Free, Plaintiff, Western Geothermal, Inc., Intervenor, vs. Transcontinental Oil Co., Inc. of Nevada, now known as Transcontinental Power Company, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, and Salton Sea Power Company, a Nevada corporation, Defendants. Case No. 207 209.

ORDER APPROVING SETTLEMENT AGREEMENT AND ASSIGNMENT OF LEASE.

The above entitled matter coming on regularly this day for hearing, and it appearing that due and proper notice has been given of the time and place of the hearing in accordance with the Order of the Court dated February 10, 1965, and it further appearing that no objections to the granting of the Petition of the Receiver dated February 8, 1965, requesting the approval of a certain Agreement and Assignment of Lease have been filed as required in the Court's Order of February 10, 1965, and the Court being fully advised in the premises and it appearing to the Court from all of the evidence presented to the Court at the trial of this action and by way of representations of counsel for the petitioner and for the Intervenor that it would be for the best interests of the stockholders of Transcon-

tinental Power Company and of Salton Sea Power Company that the Receiver enter into this Agreement, said Agreement appearing to the Court under all the evidence thus far presented to the Court to be a fair and proper one so far as the Salton Sea Power Company and the Transcontinental Power Company are concerned;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

That the Petition of Harry C. Levy for the approval of the Settlement Agreement and Assignment of Lease, marked Exhibit A and annexed to the Petition, be, and the same hereby is, granted.

II.

That by stipulation of counsel for the Intervenor and for the Receiver the date set forth on line 7, page 8 of the Settlement Agreement, which composes a part of Exhibit A, in paragraph 6 thereof, be changed from February 26, 1965, to March 26, 1965 by interlineation.

III.

That Harry C. Levy be, and he hereby is, authorized to forthwith, subject to the change of date indicated in paragraph II above, sign both the Agreement and Assignment of Lease as set forth in Exhibit A and deliver the signed copies to a proper officer of Western Geothermal, Inc. for its signature, and thereafter to file one (1) copy executed by all parties with the Clerk of the above entitled Court.

Dated this 26th day of February, 1965.

/s/ Grant L. Bowen
District Judge.

APPENDIX B.

Order of the District Court Dated May 4, 1965, Dismissing Counterclaims.

[Title of District Court and Cause.]

Upon Motion, made by Harry C. Levy, acting in his capacity Receiver, of Transcontinental Power Company and Salton Sea Power Company, two of the Defendants above named, and good cause appearing therefore,

It is Ordered, Adjudged and Decreed that the Counterclaims of the said Transcontinental Power Company and Salton Sea Power Company, be, and the same are hereby dismissed.

Dated this 4th day of May, 1965.

/s/ Grant L. Bowen
District Judge

Boyd and Leavitt
/s/ By: William E. Friedman
Attorneys for Receiver
Eight Eleven Sahara
Las Vegas, Nevada

[Rec. Vol. III, p. 421]

APPENDIX C.

Decision of the District Court Dated February 23, 1966, on Motion to Set Aside Orders.

[Title of District Court and Cause.]

On August 25, 1965, defendants moved the Court to set aside that certain Order heretofore made on the 26th day of February, 1965, which Order, among other matters, after reciting the giving of due and proper notice, approved a certain settlement agreement and assignment of a lease, copies of which were attached to the Petition of Receiver Harry C. Levy praying for approval. In general, the grounds for the Motion to set aside the Order of February 26, 1965 were that the then attorney of record, Toy E. Gregory, Esq., was indisposed, that the Order was entered by reason of mistake, inadvertence, surprise or excusable neglect of defendants and their counsel, and that the majority interests of the corporate defendants were not represented in the execution of the agreement, and that such agreement was not in the best interests of the defendant corporations or their stockholders.

[Rec. Vol. III, p. 578]

At the onset, it is to be noted that no objections were made or filed to the Receiver's Petition to approve the new agreement.

Thereafter all the subsequent proceedings, including the taking of oral testimony, the making of offers of proof, the filing of affidavits, were submitted for and on behalf of the defendant corporation in support of its contention that the February 26, 1965 Order was not only improperly entered, but that the new agree-

ment was grossly unjust to the defendant corporation. While the procedures generally followed have not been in accordance with rules of practice, as set forth in this District, I have overlooked those discrepancies. Accordingly, it would seem that the propositions advanced by defendants go to the two necessary showings that a "defaulted" defendant must make, to-wit, (1) surprise, mistake, inadvertence or excusable neglect, and (2) that a good and meritorious defense exists with the contention that the approved agreement should be placed in this category.

Counsel for defendants has made a very impressive presentation in support of the Motion. Yet, I recall that a very convincing case was made for the appointment of a receiver, a demand that something be done to avert the very real threatened forfeiture of the lease. I recall, also, that there was no money and no one was able to come up with any finances except the Intervenor through its parent, Natomas, Inc. It is said that fraud was practiced upon the Court when it was told that the lease would be cancelled immediately because a new lease was entered into not too long after February 26, 1965, and that the same had been contemplated for some time. That may or may not be true, but the fact remains that all the testimony produced at the trial of Intervenor-Defendant's portion of the case clearly showed a serious situation, situation

[Rec. Vol. III, p. 579]

where, if the lease were cancelled, everybody would be a loser.

As to the excusable neglect contention, the record in this connection is not convincing. There is no question

but what Mr. Gregory, or his firm, received notice of the hearing and that he, or his firm, ever requested any extension of time to prepare or present objections to the Receiver's Petition. It is true that he moved for a continuance, but that was directed to further trial setting, said trial to begin once again on March 9, 1965. That Motion was granted. Because of those factors and the fact that Mr. Gregory had become convinced that the Receiver's proposed agreement was the best possible arrangement, I do not believe that this is a case where a proper showing has been made under the provisions of N.R.C.P. 60, which sets forth the procedure for setting aside so-called defaults.

It is rather significant that counsel for plaintiff never entered any objection to the Receiver's request to approve a new agreement and assignment and, in fact, has not joined in the defendant's Motion to vacate the February 1965 Order. In any event, I am of the opinion that the Order of February 26, 1965 should not be set aside, that the matters presented upon the merits of the defendants' claim come too late and are not relevant to a hearing of this kind, and that the offers of proof should be denied.

It is, therefore, ORDERED that defendants' Motion of August 25, 1965, be and the same hereby is, denied. An Order is being filed in accordance with this decision.

Dated this 23rd day of February, 1966.

Grant L. Bowen
District Judge

[Rec. Vol. III, p. 580]

Appendix C.

APPENDIX D.

Order of the District Court Dated February 23, 1966, Denying the Motion to Set Aside Orders.

[Title of District Court and Cause.]

This cause came on to be heard on the Motion of defendants to set aside that certain Order heretofore made in the above-entitled action on February 26, 1965, and good cause appearing therefor

It is Hereby Ordered that the Motion to set aside default filed August 25, 1965, be denied.

Dated this 23rd day of February, 1966.

Grant L. Bowen
District Judge

[Rec. Vol. III, p. 577]

APPENDIX E.

Opinion of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming Trial Court Orders.

In the Supreme Court of the State of Nevada.

George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, Appellants, v. William Free, Respondent, Western Geothermal, Inc., Intervenor and Respondent. No. 5107.

OPINION.

Collins, Justice.

This is an appeal by George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, defendants below and officers and directors of Transcontinental Oil Co., Inc, a Nevada corporation, from various orders of the trial court. The orders complained of are: (1) an order entered by the trial court authorizing Harry C. Levy, receiver of Transcontinental Oil Co., Inc., to settle a controversy with Western Geothermal, Inc., Intervenor; (2) an order dismissing appellants' counterclaims; (3) an order denying the setting aside of the foregoing two orders. Transcontinental apparently held a lease on some land in Imperial Valley, California, valuable for production of steam from wells. It entered into a joint venture contract concerning the leasehold interest with Western Geothermal for purposes of development of the steam to produce electrical energy and other byproducts. Transcontinental encountered financial problems, and was beset with internal difficulties among the officers, directors and stockholders. It also became ensnarled in

a controversy with Western Geothermal over their contract.

William Free, a substantial stockholder of Transcontinental, commenced this action, which among other things, sought the appointment of a receiver of Transcontinental pursuant to NRS Chapter 78. Western Geothermal was permitted to intervene and joined in the relief requested. Harry C. Levy of Las Vegas, Nevada, was appointed and qualified as receiver. His appointment was immediately attacked for various reasons, but was sustained by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, 80 Nev. 207, 391 P.2d 317 (1964).

Following that decision the receiver embarked upon his duties on behalf of Transcontinental under supervision of the district court. Transcontinental had no assets except the leasehold interest in the steam lands. The record indicates some evidence of a default procedure by the owner and lessor of the steam lands because of failure to perform in accordance with the terms of the lease. There were liens and claims against the steam land for unpaid taxes, judgments and other proceedings clouding the title which were the obligation of lessee to correct. The receiver needed money to correct those problems, but had none. Finally, after considerable negotiation among the receiver and his attorney, Western Geothermal and its attorney, the appellants through their attorney of record, Toy Gregory, Sr., Esquire, of Las Vegas, a form of agreement was reached dealing with the leasehold interest and particularly the joint venture agree-

ment between Transcontinental and Western Geothermal. The new agreement provided, among other things, that Western Geothermal would pay over immediately $50,000 to the receiver to permit him to meet expenses of the receivership and to clear up clouds on the title of the leasehold property. There is no question that the agreement substantially modified the rights of Transcontinental and Western Geothermal under the original joint venture agreement, particularly in the area of drilling requirements and the nature and type of interest retained by Transcontinental. The agreement also provided for dismissal of counterclaims pleaded by Transcontinental against Western Geothermal and Free.

Receiver petitioned the district court for authority to execute the agreement. It is admitted by the parties and the count expressly found that notice of the hearing of the petition was given to Mr. Gregory as attorney for appellants. A day or so before the hearing Mr. Gregory had been seriously injured in an automobile wreck. Appellants neither in person nor through their counsel appeared at the hearing. Mr. Gregory made no request for continuance because of his accident or injuries. At the hearing the receiver appeared with his counsel and testified, urging the court to grant him authority to execute the agreement. Western Geothermal, through its counsel, likewise appeared, examined the receiver and joined in urging the court to grant authority to the receiver to enter the agreement. The court gave its permission. The agreement was executed by the parties. Western Geothermal paid over the $50,000 and the receiver went about clearing the

clouds on the title of the leasehold property and satisfying the expenses of the receivership.

Subsequently the trial court dismissed the counterclaims of Transcontinental and Salton Sea against Free and Western Geothermal as a condition of the agreement it had allowed the receiver to enter. Its first order was made ex parte. On appellants' motion to reconsider the order with proper notice to all parties, it reaffirmed its order of dismissal, and ruled there were no further issues to be tried in the lawsuit. Appellants and other parties were then served by Western Geothermal with a document entitled "Notice of Entry of Judgment," which appellants contend commenced the time running within which they could take appeal to this court from final, appealable orders of the trial court.

We conclude the errors complained of by appellants are not well taken and affirm the orders of the court below.

The question of the appointment of Harry C. Levy as receiver of Transcontinental under NRS Chapter 78 is res judicata and appellants are bound thereby. That very question was ruled upon by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, supra, at page 210-211, 391 P.2d at page 319, where we said:

"Finally, Transcontinental insists that Free did not make a proper showing to justify the appointment of a receiver and that the district court abused its discretion in granting his request. This argument is not entitled to credit. NRS 78.650(1) lists 10 circumstances, any one of which will authorize the appointment of a temporary receiver upon application by a holder of 10% of

the outstanding stock. For the purposes of this opinion it is sufficient to note that Free alleges four of them in his amended verified complaint. The affidavit of Kenneth P. Dillon alleges one of them, viz., danger to the public. Clearly, the showing was sufficient. International Life Underwriters, Inc. v. Second Judicial District Court, etc., 61 Nev. 42, 113 P.2d 616, 115 P. 2d 932." The very point being once raised and ruled upon, we will not consider it further. Tomiyasu v. Golden, 81 Nev. 140, 400 P.2d 415 (1965). There was (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; (4) identity of the quality in the person for or against whom the claim is made. Smith v. Gray, 50 Nev. 56, 67, 250 P. 369 (1926).

The orders, which are in a sense final orders and terminate the litigation, are appealable. NRCP 72(b)(1)[1]; 4 C.J.S. Appeal and Error § 132, nn. 40.5, 45.15, § 147, n. 84; State ex rel. Unemployment Compensation Board etc. v. Burton, 112 Ind.App. 268, 44 N.E.2d 506, 508 (1942); Jordan v. Burbach, 330 S.W.2d 249, 252 (Tex.Civ.App., 1959); Northern Nevada Loan Association v. John H. Cazier & Sons Co., 49 Nev. 115, 118, 239 P. 395, 396 (1925); cf. Alper v. Posin, 77 Nev. 328, 363 P.2d 502 (1961); Nevada First National Bank of Tonopah v. Lamb, 51 Nev. 162, 271 P. 691 (1928). Appellants, so far as the record reveals, are officers and directors of Transcontinental, and as such are entitled to entertain this appeal. This court said in Golden v. Fifth

[1]NRCP 72 "(b) Appealable Determinations. An appeal may be taken:

"(1) From a final judgment in an action or proceeding commenced in the court in which the judgment is rendered."

Judicial District Court, Mark R. Averill, Judge et al., 31 Nev. 250, at page 263, 101 P. 1021, at page 1026 (1909): "We think, however, that the directors are necessary parties. They of necessity have a financial interest in the corporation, and are the ones who are intrusted with its management by the stockholders. * * * An order dissolving a corporation and placing its affairs in the hands of a receiver, not only effects a radical change in the legal status, but ousts the control of its affairs by the board of directors as such."

Appellants complain most strongly about the trial court's order authorizing the receiver to enter a compromise agreement on behalf of Transcontinental with Western Geothermal concerning the joint venture contract relating to the leasehold interest in the steam lands. Pursuant to this same agreement the counterclaims were dismissed and the litigation for all intents and purposes ended. Appellants say the action of the trial court; (a) constituted an erroneous delegation of judicial power beyond the jurisdiction of the court; (b) constitution the making of a new contract between the litigants; (c) deprived them of property without due process; (d) exceeded the powers of the receiver who they contend had powers only under NRS Chapter 32 and not NRS Chapter 78.

The last point is quickly disposed of because the appointment was clearly under NRS Chapter 78, approved by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, supra, and is res judicata.

We note that NRS Chapter 78 deals exclusively with private corporations, not joint adventurers, individuals, partners or otherwise. Transcontinental Oil Co. ad-

mittedly is a private Nevada corporation, and so far as the receivership is concerned is the only corporation (even though a party to the joint venture agreement with Western Geothermal) for whom receivership was sought. To say that a receiver appointed to handle the affairs of one private corporation could, without more, also deal in the same manner with the affairs of another private corporation (Western Geothermal) is without authority anywhere. It is said in Clark on Receivers, Third Edition, Vol. I, Sec. 11(a), pages 13 and 14:

"(a) Receiver appointed by court. A receiver appointed by the court is a person who by such appointment becomes an officer of the court to receive, collect, care for, administer, and dispose of the property or the fruits of the property of another or others brought under the orders of court by the institution of a proper action or actions.

"A receiver appointed by the court is an arm or hand of the court, and as said above, an officer of the court and a representative of the court.

"The court itself, having assumed jurisdiction, obtains by its orders the control of the property. The receiver is but the court's officer. He is subject to the court's directions and orders and in the discharge of his official duties is entitled to apply to the court for instructions.

"After the appointment of the receiver is effected, the relation of the receiver and the original defendant or owner is that of caretaker and owner."

[4] A receiver appointed by a court under NRS Chapter 78 has broad powers, subject of course to the

continuing supervision and approval of the court. NRS 78.635(2) sets forth that power and authority and states:

"(a) To demand, sue for, collect, receive and take into his or their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property, of every description of the corporation; and

"(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation; and

"(c) In his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; and

"(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity."

Subparagraph (c) specifically authorizes a receiver to "compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; * * *." Clark on Receivers, Third Edition, in construing the power of re-

ceivers to compromise claims, says in Vol. 2, Sec. 366, page 623:

"When a receiver has been authorized by the court to collect claims, he does so as a part of the court's equitable power to preserve the res. In preserving the res the court exercises discretion, which may go so far as to determine that it is for the best interest of the receivership to accept part of a claim, rather than take a chance and suffer the hazard of a prolonged proceeding demanding the full amount. The court's order to a receiver to compromise a claim or claims should be very definite and clear."

In Vol. 3, Sec. 655, page 1147, he says:

"A receiver when administering or settling an estate of one kind or another, or operating a business under orders of court, is frequently confronted with the proposition: Shall he compromise a claim for or against the estate, or shall he sue or stand suit? If the receiver's order of appointment expressly authorizes the receiver to compromise such claims, then he must use his discretion and best business judgments as to matters too small to present to the court. However, it is better practice and the better part of wisdom to go to the court and ask the court's instructions as to compromising large or substantial claims. In addition to going before the court, it is further advisable to notify all parties or creditors who may be vitally interested in such a compromise. Although the receiver may not compromise claims without the order of court, nevertheless his acts of compromising claims subsequently may be ratified. * * *"

Appendix E.

Here the district court allowed the compromise proposed by receiver. It had substantial evidence before it, and we will not disturb its order. Furthermore, neither appellants nor their counsel appeared at the hearing and offered objection to it. They should not be heard to complain now.

Clark on Receivers, Third Edition, Vol. 2, Sec. 423, page 711, states: "The receiver by accepting the receivership does not adopt the contracts and obligations of the defendant." He cites as authority for that statement Peabody Coal Co. v. Nixon et al., 8 Cir. (1915), 226 F. 20. In that case receivers were appointed for a railroad company. The railroad had a contract with a coal company to purchase certain quantities of coal at a price determined by a complex formula. Receivers notified the coal company they would not be bound by the contract and asked the chancellor to approve their action. The coal company opposed the action of the receivers and sought to convince a master to whom the matter was referred for the taking of evidence, that the contract was in the best interest of the receivers and it should affirm the contract. In the meantime negotiations were undertaken between the receivers and the coal company to compromise the matter and reach a negotiated settlement. This failed. The court stated at page 22 of the report, "We had occasion in another case [Kansas City Southern Ry. Co. v. Lusk et al., 8 Cir., 224 F. 704] at this term to observe that it is not the rule that the contract of the owner of a trust estate is binding on the receivers until renounced, but, contra, that the receivers are not bound by the contract until they have affirmed it and assumed its burdens under

the direction of the court. We need not say much more. * * *". The court approved the receivers' renouncement of the contract in its entirety.

Clark on Receivers, Third Edition, further states, Vol. 2, Sec. 423, page 711. "Ordinarily, the court will not order the receiver to perform contracts which are not beneficial to the estate represented by the receiver." The record in this case indicates the receiver, considering all aspects of the problem facing Transcontinental, felt it was in the best interest of the company to compromise the claim it had against Western Geothermal under the joint venture agreement in the leasehold of the steam lands. This proposal was presented to the court for its instruction. The court approved and authorized the compromise. We see no error.

Other points were urged, but since they will not affect the result we decline to pass upon them.

Affirmed.

Thompson, *C. J.*, and Zenoff, *J.*, concur.

[Rec. Vol. XII, pp. 99 *et seq.*]

APPENDIX F.

Judgment of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming the Trial Court.

[Title of Supreme Court of the State of Nevada and Cause.]

Remittitur No. 5107

Appeal from Orders

This case came on regularly to be heard on the 2nd day of November, 1966 when Charles E. Springer, Esq. of the firm Springer & Newton and Roy B. Woolsey, Esq. of Newport Beach, California, counsel for appellants and John C. Bartlett, Esq. of the firm Vargas, Dillon, Bartlett and Dixon and William E. Freedman, counsel for respondents were duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular, the law and the premises having been seen, heard and duly considered and the court being fully advised of the law, files with the clerk of this court its opinion in writing by Collins, J. concurred in by Thomas, C. J. and Zenoff, J. to the effect:

"Affirmed."

Whereupon, it is Now Ordered, Adjudged and Decreed as quoted above.

Judgment entered this 9th day of January, 1967.

[Rec. Vol. XII, p. 128]

APPENDIX G.

Order (Constituting an Opinion) of the Supreme Court of Nevada Dated February 13, 1967, Denying Petition for Rehearing.

[Title of Supreme Court of the State of Nevada and Cause.]

Filed: Feb. 13, 1967.

ORDER

Per Curiam:

Appellants move for rehearing on four grounds. Rehearing is denied.

The first ground urged is that this court failed to act upon appellants' motion to allow Transcontinental Oil Co., Inc., to become a party appellant. A first notice of appeal tendered to the clerk of the district court included Transcontinental as well as Salton Sea Power Company as appellants. This notice was not filed because it was not accompanied by the proper fee nor the cost bond on appeal. The notice of appeal upon which this court assumed jurisdiction failed to include either Transcontinental or Salton Sea as parties appellant. Previously this court by order struck a stipulation and order by which appellants sought to amend the notice of appeal to include Transcontinental. To say we have failed to consider the matter is not supported by the record. Furthermore, there is authority dealing with an effort to substitute additional parties after a notice of appeal has been filed. It was held in

Cook & Sons Equipment, Inc. v. Killen, 9 Cir., 277 F.2d (1960), as follows:

"After the entry of judgment in favor of plaintiff, an appeal was taken in which the corporation alone was named as appellant. No mention of the individual defendants was made. After the lodging of the appeal, a motion was made by the individual defendants to have their names added to the notice of appeal on the ground that the omission was a clerical error. The omission here was much more than a clerical error. It was a failure of the individual defendants to appeal. We have no authority to amend a notice of appeal so as to bring in additional parties. * * * Rule 73(b) [virtually identical with NRCP 73(b)] requires that the notice of appeal specify the parties taking the appeal. Only the parties named in the notice of appeal are brought within the appellate court's jurisdiction. VII Moore, Federal Practice (2d ed. 1955) §§ 73.13, 73.14. The harmless error doctrine has no application to failure to name parties in a notice of appeal."

Points 2, 3, and 4, urged by appellants, were clearly disposed of by the decision and we see no reason or grounds for reconsideration of them.

Attached to this petition is a certified copy of the notice and proof of service referred to in point 1 of the petition for rehearing. This court held in Clack v. Jones, 62 Nev. 76, 141 P.2d 385 (1943), and in Estate of Powell, 62 Nev. 121, 140 P.2d 943 (1943), that no

document or paper other than the petition can be considered on motion for rehearing under Supreme Court Rule XV (now Rule 34). Therefore the certified copy of the notice and proof of service is stricken.

Rehearing denied.

Thompson, *C. J.*
Collins, *J.*
Zenoff, *J.*

CC:
Attorneys of Record

[Rec. Vol. XII, pp. 125 *et seq.*]

APPENDIX H.

Judgment by the Supreme Court of the State of Nevada Dated February 13, 1967, Denying Petition for Rehearing.

[Title of Supreme Court of the State of Nevada and Cause.]

On Petition for Rehearing

A decision having been rendered in the above-entitled case, counsel on behalf of appellants, within the time prescribed by the rules of this court, filed with this court a Petition for Rehearing.

Now, on this day, all and singular, the law and the premises having again been reviewed, seen, heard and duly considered, and the court being fully advised of the law files with the clerk of this court its opinion in rehearing by *per curiam* to the effect:

"Rehearing denied."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 13th day of February, 1967.